# THE CONSTITUTIONAL OPINIONS OF JUSTICE HOLMES

CALLED upon late in life to teach constitutional law, a great teacher of property law, after a brief trial, gave it up in despair on the ground that constitutional law "was not law at all, but politics." John Chipman Gray was right — if his norm of law was the rule against perpetuities; not, however, if we concede it to be the law's province also to settle controversies that involve more complex interests, permitting of flexibility in application to make the necessary accommodation to the diversities and changes in the facts of life We find a growing extension of this sphere of law, a gradual displacement of force by law, bringing not only the peaceful settlement of controversies as isolated instances, each on its own bottom, but settlement based on certain common considerations beyond the mere avoidance of force.[1] Undoubtedly, such a field of law by the very nature of the issues sought to be settled, by reason of the interests sought to be enforced, leaves wider scope and calls for the exercise of a broader experience than the familiar domains of the common law. Such, in effect, has been that body of decisions contained in the two hundred and forty volumes of United States Reports which we call American Constitutional Law. To be sure we are in the field of greatest flexibility. Undoubtedly the Constitution is what the Supreme Court interprets it to be — and constitutional interpretation inescapably opens a Pandora's box of difficulties. But there are differences between this body of constitutional decisions and the judgments of a Kadi or the foreign policies of a Secretary of State. Just these differences entitle the decisions to be called law. But the necessary flexibility makes the personality of the justices so much more important in their decisions on constitutional law than in questions of property or corporation law.

There is thus marked opportunity for individual influence in the collective judgment which a Marshall exercised. Of course he did

[1] See, for instance, the line of thought opened up by Mr. Justice Higgins in "A New Province for Law and Order," 29 HARV. L. REV. 13.

not attain single-handed, and we know that among his associates were probably two men of more commanding equipment as common law lawyers. But it is to Marshall that we owe the foundations of our national power as they were laid. From Marshall's days, except for an occasional flurry, there is a comparatively quiescent period in constitutional law until the acute, and growingly acute, issues of the last thirty years reflected themselves more intensely in legislation. This brought sharp contests before the Supreme Court. Two issues mainly concerned the Court: the scope of the power of Congress over Commerce, and the new limitations placed upon the states by the Fourteenth Amendment. The Commerce clause had been largely a slumbering power until the Interstate Commerce Act and the Sherman Law, and, more particularly, the legislation since 1906, brought its intensive application into constant question and resistance. In a series of important litigations there was pressed for decision, not only invalidity of State legislation as an encroachment upon the Federal power, but, even more, the affirmative exercise of the Federal power, rendered significant and detailed because of the pervasive aspect of modern commerce. The second class of cases involved the whole brood of questions arising from the new power of negation of the Federal Constitution over State action.

Mr. Justice Holmes came to the Supreme Court at this period of legislative exuberance, marking a broad extension of governmental activities both in Nation and States. There was thus presented to the Court in greater volume and with unparalleled intensity, the determination of the powers of the Nation and of the State, and a delimitation of the field between them — questions whose decision probably touched the public at once more widely and more immediately than any issues at any previous stage of the Court's history. On both these two basic problems of constitutional law — the power of the States and the power of the Nation — Mr. Justice Holmes's influence has been steady and consistent and growing. His opinions form a coherent body of constitutional law, and their effect upon the development of the law is the outstanding characteristic of constitutional history in the last decade.

In our days, as in Marshall's, the issues before the Court have necessitated not merely an interpretation of this or that specific clause of the Constitution, but an inquiry into the fundamental attitude

toward the Constitution and a conscious realization of the function of the Court as its interpreter. Marshall's great major premise was that "it is *a constitution* we are expounding." That was the background against which he projected every inquiry as to specific power or specific limitation. With that as a starting point, with the recognition, not as an arid bit of intellectualism but enforced with emotional drive, that the Constitution deals with great governmental powers to be exercised to great public ends, he went far toward erecting the structure within which the national spirit could freely move and flourish. Like all truths, Marshall's great canons had to be revivified by new demands that were made upon them by a new generation. Constant resort to the reviewing power of the Court based on claims that acts of legislatures or Congress transcended constitutional limitations, called again for a major premise as to the scope of the instrument which the Court must construe and the right attitude of the Court in its interpretative function. There always *is* a starting point in such questions, however inarticulate or even unconscious. What the pressure of new legislation demanded was a conscious re-examination of the starting point, of a vigorous realization of the scope and purpose of constitutional law, an analysis of the realistic issues in any given constitutional question. In a time of legislative activity, in a period of especial unrest in the law, signifying an absorption of new facts and changing social conceptions,[2] the starting point must be a conscious one, lest power and policy be unconsciously confused.

Mr. Justice Holmes has recalled us to the traditions of Marshall, that it *is* a Constitution we are expounding, and not a detached document inviting scholastic dialectics. To him the Constitution is a means of ordering the life of a young nation, having its roots in the past — "continuity with the past is not a duty but a necessity" — and intended for the unknown future. Intentionally, therefore, it was bounded with outlines not sharp and contemporary, but permitting of increasing definiteness through experience.

"The provisions of the Constitution are not mathematical formulas having their essence in their form; they are organic living institutions

[2] See Dean Pound's various papers, particularly, "Do we need a Philosophy of Law?" 5 COL. L. REV. 339; "Common Law and Legislation," 21 HARV. L. REV. 383; "Mechanical Jurisprudence," 8 COL. L. REV. 605; "The Scope and Purpose of Sociological Jurisprudence," 24 HARV. L. REV. 591; 25 *ibid.* 489.

transplanted from English soil. Their significance is vital not formal; it is to be gathered not simply by taking the words and a dictionary, but by considering their origin and the line of their growth." [3]

He has ever been keenly conscious of the delicacy involved in reviewing other men's judgment not as to its wisdom but as to their right to entertain the reasonableness of its wisdom. We touch here the most sensitive spot in our constitutional system: that its successful working calls for minds of extraordinary intellectual disinterestedness and penetration lest limitations in personal experience and imagination be interpreted, however conscientiously or unconsciously, as constitutional limitations. When regard is had to the complexities of modern society and the necessary specialization and narrowness of individual experience, the need for tolerance and objectivity in realizing, and then respecting, the validity of the experience and beliefs of others, becomes one of the most dynamic factors in the actual disposition of concrete cases.

"Great constitutional provisions must be administered with caution. Some play must be allowed for the joints of the machine, and it must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts." [4]

"While the courts must exercise a judgment of their own, it by no means is true that every law is void which may seem to the judges who pass upon it excessive, unsuited to its ostensible end, or based upon conceptions of morality with which they disagree. Considerable latitude must be allowed for differences of view as well as for possible peculiar conditions which this court can know but imperfectly, if at all. Otherwise a constitution, instead of embodying only fundamental rules of right, as generally understood by all English-speaking communities, would become the partisan of a particular set of ethical or economical opinions, which by no means are held *semper ubique et ab omnibus*." [5]

Therefore, except in the case of a few specific constitutional prohibitions (for that very reason rarely called into question), we are at once in a different atmosphere of approach from the rigid and the absolute. We are in a field where general principles are recognized but settle few controversies. Claim or denial of governmental power, of "individual rights," reveal themselves not as logical an-

[3] Gompers *v.* United States, 233 U. S. 604, 610.

[4] Missouri, Texas and Kansas Ry. *v.* May, 194 U. S. 267, 270.

[5] Otis *v.* Parker, 187 U. S. 606, 608–9.

titheses, but as demands of clashing "rights," of matters of more or less, of questions of degree.

"General propositions do not decide concrete cases. The decision will depend on a judgment or intuition more subtle than any articulate major premise." [6]

"As in other cases where a broad distinction is admitted, it ultimately becomes necessary to draw a line, and the determination of the precise place for that line in nice cases always seems somewhat technical, but still the line must be drawn." [7]

This by no means implies a crude empiricism. True, judgment, conscious or inert, enters. Choice must be exercised. The choice is not, however, capricious; it involves judgment between defined claims, each of recognized validity, each with a pedigree of its own, but all of which necessarily cannot be satisfied completely.

"All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached. The limits set to property by other public interests present themselves as a branch of what is called the police power of the State. The boundary at which the conflicting interests balance cannot be determined by any general formula in advance, but points in the line, or helping to establish it, are fixed by decisions that this or that concrete case falls on the nearer or farther side. For instance, the police power may limit the height of buildings, in a city, without compensation. To that extent it cuts down what otherwise would be the rights of property. But if it should attempt to limit the height so far as to make an ordinary building lot wholly useless, the rights of property would prevail over the other public interest, and the police power would fail. To set such a limit would need compensation and the power of eminent domain." [8]

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[6] Lochner *v.* New York, 198 U. S. 45, 76.

[7] Ellis *v.* United States, 206 U. S. 246, 260.

The recognition of differences of degree in the whole development of the law is most luminously put in the following passage: "I do not think we need trouble ourselves with the thought that my view depends upon differences of degree. The whole law does so as soon as it is civilized. See Nash *v.* United States, 229 U. S. 373, 376, 377. Negligence is all degree — that of the defendant here degree of the nicest sort; and between the variations according to distance that I suppose to exist and the simple universality of the rules in the Twelve Tables or the Leges Barbarorum, there lies the culture of two thousand years." — Leroy Fibre Co. *v.* Chicago, Milwaukee & St. Paul Ry., 232 U. S. 340, 354.

[8] Hudson County Water Co. *v.* McCarter, 209 U. S. 349, 355–6.

Thus, while Mr. Justice Holmes has expounded the philosophy of differences of degree and applied it in a variety of cases, he has been alert to demand a telling difference upon which a distinction can be predicated. A neat instance is his dissenting opinion in *Haddock* v. *Haddock*.

"I am the last man in the world to quarrel with a distinction simply because it is one of degree. Most distinctions, in my opinion, are of that sort, and none are the worse for it. But the line which is drawn must be justified by the fact that it is a little nearer than the nearest opposing case to one pole of an admitted antithesis. When a crime is made burglary by the fact that it was committed thirty seconds after one hour after sunset, ascertained according to mean time in the place of the act, to take an example from Massachusetts (R. L. c. 219, sec. 10), the act is a little nearer to midnight than if it had been committed one minute earlier, and no one denies that there is a difference between night and day. The fixing of a point when day ends is made inevitable by the admission of that difference. But I can find no basis for giving a greater jurisdiction to the courts of the husband's domicil when the married pair happens to have resided there a month, even if with intent to make it a permanent abode, than if they had not lived there at all." [9]

This, in brief, is the attitude in which and the technique with which Mr. Justice Holmes approaches the solution of specific questions in the two great active fields of constitutional law: the Commerce Clause and the Fourteenth Amendment.

Just as the needs of commerce among the several states furnished the great centripetal force in the establishment of the Nation, so the Commerce Clause has now become the most important nationalizing agency of the Federal Government. Mr. Justice Holmes has at once applied this power with unimpaired depth and breadth, and affirmed the true basis of its need to-day no less than in 1789.

"I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several States. For one in my place sees how often a local policy prevails with those who are not trained to national views, and how often action is taken that embodies what the Commerce Clause was meant to end." [10]

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[9] Haddock *v.* Haddock, 201 U. S. 562, 631–2.

[10] "Law and the Court," Speech at a dinner of the Harvard Law School Association of New York on Feb. 15, 1913, from SPEECHES by Oliver Wendell Holmes, 98, 102.

He has sought to enforce the power of commerce among the states with depth and breadth because to him such "commerce is not a technical legal conception, but a practical one drawn from the course of business." [11] That interstate commerce is a practical conception he recognizes in its practical implications. Thus, commerce means, not only transportation, not only control over the instrumentalities of transportation, but the human relations involved in commerce. They present some of the acutest problems of commerce. Therefore, insisting in himself as he does in others on the need "to think things instead of words," in one of his memorable opinions, against the majority of the Court, he asserted the power of Congress to legislate in regard to the industrial relations on interstate railroads as a means of securing industrial peace.

"It cannot be doubted that to prevent strikes, and, so far as possible, to foster its scheme of arbitration, it might be deemed by Congress an important point of policy, and I think it impossible to say that Congress might not reasonably think that the provision in question would help a good deal to carry its policy along. But suppose the only effect really were to tend to bring about the complete unionizing of such railroad laborers as Congress can deal with, I think that object alone would justify the act. I quite agree that the question what and how much good labor unions do, is one on which intelligent people may differ, — I think that laboring men sometimes attribute to them advantages, as many attribute to combinations of capital disadvantages, that really are due to economic conditions of a far wider and deeper kind — but I could not pronounce it unwarranted if Congress should decide that to foster a strong union was for the best interest, not only of the men, but of the railroads and the country at large." [12]

The extension of interstate commerce through modern inventions, the overwhelming field which it has absorbed, are obvious. Logically, there is no limit to the interrelation of national commerce and the activities of men in the separate States. But the main ends of our dual system of States and Nation here, too, call for adjustment, and logic cannot hold sterile sway.

"In modern societies every part is related so organically to every other, that what affects any portion must be felt more or less by all the

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[11] Swift *v.* United States, 196 U. S. 375, 398.

[12] Adair *v.* United States, 208 U. S. 161, 191–2. *Cf.* Mr. Justice Higgins in 29 HARV. L. REV. 13, 23 *ff.*

rest. Therefore, unless everything is to be forbidden and legislation is to come to a stop, it is not enough to show that, in the working of a statute, there is some tendency, logically discernible, to interfere with commerce or existing contracts.[13]

Therefore distinctions have to be made and "even nice distinctions are to be expected." [14] But the Federal power must be dominantly left unimpaired and a State cannot defeat the withdrawal of national commerce from State tampering "by invoking the convenient apologetics of the police power." [15]

Thus far as to the great Federal power which indirectly limits State activity. In its negative prohibitions the Constitution is a denial of State action as such. When the Fourteenth Amendment first came before the Court in the Slaughterhouse Cases,[16] the four dissenting justices, under the lead of Mr. Justice Field, sought to pour into the general words of the Due Process Clause the eighteenth century "law of nature" philosophy. This attempt gradually prevailed and Mr. Justice Field's dissent in effect established itself as the prevailing opinion of the Supreme Court.[17] In *Allgeyer* v. *Louisiana*,[18] we reach the crest of the wave. The break comes with the Lochner case.[19] Mr. Justice Holmes has given us the explanation for this attempt to make a permanent prohibition of a temporary theory.

"It is a misfortune if a judge reads his conscious or unconscious sympathy with one side or the other prematurely into the law, and forgets that what seem to him to be first principles are believed by half his fellow men to be wrong. I think that we have suffered from this misfortune, in State courts at least, and that this is another and very important truth to be extracted from the popular discontent. When twenty years ago a vague terror went over the earth and the word socialism began to be heard, I thought and still think that fear [20] was translated into doctrines

[13] Diamond Glue Co. *v.* United States Glue Co., 187 U. S. 611, 616.

[14] Galveston, etc. Ry. *v.* Texas, 210 U. S. 217, 225.

[15] Kansas Southern Ry. *v.* Kaw Valley District, 233 U. S. 75, 79.

[16] 16 Wall. (U. S.) 36.

[17] See Dean Pound, "Liberty of Contract," 18 YALE L. J. 454, 470.

[18] 165 U. S. 578.

[19] 198 U. S. 45.

[20] That this fear has been an unconscious factor he has told us elsewhere: "When socialism first began to be talked about, the comfortable classes of the community were a good deal frightened. I suspect that this fear has influenced judicial action both here and in England, yet it is certain that it is not a conscious factor in the de-

that had no proper place in the Constitution or the common law. Judges are apt to be naif, simple-minded men, and they need something of Mephistopheles. We too need education in the obvious — to learn to transcend our own convictions and to leave room for much that we hold dear to be done away with short of revolution by the orderly change of law." [21]

Against this subtle danger of the unconscious identification of personal views with constitutional sanction he has battled incessantly. Enough is said if it is noted that the tide has turned. The turning point is the dissent in the Lochner case. It still needs to be quoted.

"The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics. . . . Some of these laws embody convictions or prejudices which judges are likely to share. Some may not. But a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of *laissez faire*. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the questions whether statutes embodying them conflict with the Constitution of the United States." [22]

His general attitude towards the Fourteenth Amendment at once reflects his whole point of view towards constitutional interpretation and is a clue to the hundreds of opinions in which it is applied. In all the variety of cases the opinions of Mr. Justice Holmes show the same realism, the same refusal to defeat life by formal logic, the same regard for local needs and local habits, the same deference to local knowledge. He recognizes that government necessarily means experimentation; and while the very essence of constitutional limi-

cisions to which I refer. I think that something similar has led people who no longer hope to control the legislatures to look to the courts as expounders of the Constitutions, and that in some courts new principles have been discovered outside the bodies of those instruments, which may be generalized into acceptance of the economic doctrines which prevailed about fifty years ago, and a wholesale prohibition of what a tribunal of lawyers does not think about right. I cannot but believe that if the training of lawyers led them habitually to consider more definitely and explicitly the social advantage on which the rule they lay down must be justified, they sometimes would hesitate where now they are confident, and see that really they were taking sides upon debatable and often burning questions." "The Path of the Law," 10 HARV. L. REV. 457, 467.

[21] SPEECHES by Oliver Wendell Holmes, "Law and the Court," Speech at a dinner of the Harvard Law School Association of New York on Feb. 15, 1913, 98, 101–102.

[22] Lochner *v.* New York, 198 U. S. 45, 75–6.

tations is to confine the area of experimentation, the limitations are not self-defining, and they were intended to permit government. Necessarily, therefore, the door was not meant to be closed to trial and error. "Constitutional law, like any other mortal contrivance, has to take some chances." [23] The ascertainment of the limitations must be, as recently put by Mr. Justice McKenna, through "a judgment from experience as against a judgment from speculation." [24] That means that opportunity must be allowed for vindicating reasonable belief by experience.

"In answering that question we must be cautious about pressing the broad words of the Fourteenth Amendment to a drily logical extreme. Many laws which it would be vain to ask the court to overthrow could be shown, easily enough to transgress a scholastic interpretation of one or another of the great guarantees in the Bill of Rights. They more or less limit the liberty of the individual or they diminish property to a certain extent. We have few scientifically certain criteria of legislation, and as it often is difficult to mark the line where what is called the police power of the States is limited by the Constitution of the United States, judges should be slow to read into the latter a *nolumus mutare* as against the law-making power." [25]

"Again we cannot wholly neglect the long settled law and common understanding of a particular state in considering the plaintiff's rights. We are bound to be very cautious in coming to the conclusion that the Fourteenth Amendment has upset what thus has been established and accepted for a long time. Even the incidents of ownership may be cut down by the peculiar laws and usages of a state." [26]

"Obviously the question so stated is one of local experience on which this court ought to be very slow to declare that the State Legislature was wrong in its facts. *Adams* v. *Milwaukee*, 228 U. S. 572, 583. If we might trust popular speech in some States it was right — but it is enough that this court has no such knowledge of local conditions as to be able to say that it was manifestly wrong." [27]

"If the Fourteenth Amendment is not to be a greater hamper upon the established practices of the States in common with other governments than I think was intended, they must be allowed a certain latitude in the minor adjustments of life, even though by their action the burdens

[23] Blinn *v.* Nelson, 222 U. S. 1, 7.

[24] Tanner *v.* Little, Sup. Ct. Off., No. 224, decided March 6, 1916.

[25] Noble State Bank *v.* Haskell, 219 U. S. 104, 110.

[26] Otis Co. *v.* Ludlow Co., 201 U. S. 140, 154.

[27] Patsone *v.* Pennsylvania, 232 U. S. 138, 144–5.

of a part of the community are somewhat increased. The traditions and habits of centuries were not intended to be overthrown when that amendment was passed." [28]

The application of the Fourteenth Amendment, as thus approached, falls, broadly speaking, into four great classes of cases: legislation called forth by the modern industrial system, regulation of utilities, eminent domain, and taxation. As to each of these classes an illustration or two will have to suffice.[29] To discuss Mr. Justice Holmes's opinions is to string pearls.

In industrial and social legislation the fighting, of course, has been around the conception of "liberty." Mr. Justice Holmes has been unswerving in his resistance to any doctrinaire interpretation. The effectiveness of his fight lies mostly in the acuteness with which he has disclosed when a claim is doctrinaire. Perception of the forces of modern society and persistent study of economics have enabled him to translate large words in terms of the realities of existence.

"If Montana deems it advisable to put a lighter burden upon women than upon men with regard to an employment that our people commonly regard as more appropriate for the former, the Fourteenth Amendment does not interfere by creating a fictitious equality where there is a real

[28] Interstate Ry. Co. *v.* Massachusetts, 207 U. S. 79, 87.

[29] Since his accession to the Supreme Court in 1902, Mr. Justice Holmes has written about 500 opinions; of these, about 200 involve constitutional law. In view of the increase of work before the Court in recent years, Mr. Justice Holmes has already participated in decisions extending considerably over one-fifth in volume of the decisions of the Court since 1789. One is reminded of his remarks at a dinner given him by the Boston Bar when he became Chief Justice of the Massachusetts Supreme Court: "I look into my book in which I keep a docket of the decisions of the full court which fall to me to write, and find about a thousand cases. A thousand cases, many of them upon trifling or transitory matters, to represent nearly half a lifetime! A thousand cases, when one would have liked to study to the bottom and to say his say on every question which the law ever has presented, and then to go on and invent new problems which should be the test of doctrine, and then to generalize it all and write it in continuous, logical, philosophic exposition, setting forth the whole *corpus* with its roots in history and its justifications of expedience real or supposed!

"Alas, gentlemen, that is life. I often imagine Shakespeare or Napoleon summing himself up and thinking: 'Yes, I have written five thousand lines of solid gold and a good deal of padding — I, who would have covered the milky way with words which outshone the stars!' 'Yes, I beat the Austrians in Italy and elsewhere: I made a few brilliant campaigns, and I ended in middle life in a *cul-de-sac* — I, who had dreamed of a world monarchy and Asiatic power.' We cannot live our dreams. We are lucky enough if we can give a sample of our best, and if in our hearts we can feel that it has been nobly done." From SPEECHES by Oliver Wendell Holmes, Speech at a dinner given to Chief Justice Holmes by the Bar Association of Boston on March 7, 1900, 82, 83.

difference. The particular points at which that difference shall be emphasized by legislation are largely in the power of the state." [30]

"In present conditions a workman not unnaturally may believe that only by belonging to a union can he secure a contract that shall be fair to him. *Holden* v. *Hardy*, 169 U. S. 366, 397; *Chicago, Burlington & Quincy R.* v. *McGuire*, 219 U. S. 549, 570. If that belief, whether right or wrong, may be held by a reasonable man, it seems to me that it may be enforced by law in order to establish the equality of position between the parties in which liberty of contract begins. Whether in the long run it is wise for the workingmen to enact legislation of this sort is not my concern, but I am strongly of opinion that there is nothing in the Constitution of the United States to prevent it, and that *Adair* v. *United States*, 208 U. S. 161, and *Lochner* v. *New York*, 198 U. S. 45, should be overruled." [31]

"If the legislature shares the now prevailing belief as to what is public policy and finds that a particular instrument of trade war is being used against that policy in certain cases, it may direct its law against what it deems the evil as it actually exists without covering the whole field of possible abuses, and it may do so none the less that the forbidden act does not differ in kind from those that are allowed. . . .

"It might have been argued to the legislature with more force than it can be to us that recoupment in one place of losses in another is merely an instance of financial ability to compete. If the legislature thought that that particular manifestation of ability usually came from great corporations whose power it deemed excessive and for that reason did more harm than good in their State, and that there was no other case of frequent occurrence where the same could be said, we cannot review their economics or their facts." [32]

What makes these opinions significant beyond their immediate expression is that they come from a man who, as a judge, enforces statutes based upon economic theories which he does not share, and of whose efficacy in action he is sceptical.[33] The judicial function here finds its highest exercise.

In the regulation of utilities we have an excellent illustration of the need of balancing interests and the delicacy of the task. Mr. Justice Holmes has both laid down the general considerations and illustrated their application.

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[30] Quong Wing *v.* Kirkendall, 223 U. S. 59, 63.

[31] Coppage *v.* Kansas, 236 U. S. 1, 26–7.

[32] Central Lumber Co. *v.* South Dakota, 226 U. S. 157, 160, 161.

[33] (See, *e. g.*, Dr. Miles Medical Co. *v.* Park & Sons, 220 U. S. 373, 411–412.)

"An adjustment of this sort under a power to regulate rates has to steer between Scylla and Charybdis. On the one side if the franchise is taken to mean that the most profitable return that could be got, free from competition, is protected by the Fourteenth Amendment, then the power to regulate is null. On the other hand if the power to regulate withdraws the protection of the Amendment altogether, then the property is naught. This is not a matter of economic theory, but of fair interpretation of a bargain. Neither extreme can have been meant. A midway between them must be hit." [34]

"We express no opinion whether to cut this telephone company down to six per cent by legislation would or would not be confiscatory. But when it is remembered what clear evidence the court requires before it declares legislation otherwise valid void on this ground, and when it is considered how speculative every figure is that we have set down with delusive exactness, we are of opinion that the result is too near the dividing line not to make actual experiment necessary. The Master thought that the probable net income for the year that would suffer the greatest decrease would be 8.60 per cent on the values estimated by him. The Judge on assumptions to which we have stated our disagreement makes the present earnings $5\frac{10}{17}$ per cent with a reduction by the ordinance to $3\frac{6}{17}$ per cent. The whole question is too much in the air for us to feel authorized to let the injunction stand." [35]

The cases arising under the power of eminent domain furnish a striking illustration of the element of relativity in constitutional law. It is settled that a State can take private property for "public purposes." What is "a public purpose"? The Supreme Court has refused to allow the States to be fettered by formula on this subject. Time and place and local need as determined by the local legislature must govern. Mr. Justice Holmes the other day again gave point to these considerations in sustaining the growing control by States over water power.

"In the organic relation of modern society it may sometimes be hard to draw the line that is supposed to limit the authority of the legislature to exercise or delegate the power of eminent domain. But to gather the streams from waste and to draw from them energy, labor without brains, and so to save mankind from toil that it can be spared, is to supply what, next to intellect, is the very foundation of all our achievements and all our welfare. If that purpose is not public we should be at a loss to say

[34] Cedar Rapids Gas Co. *v.* Cedar Rapids, 223 U. S. 655–669.

[35] Louisville *v.* Cumberland Tel. & Tel. Co., 225 U. S. 430, 436.

what is. The inadequacy of use by the general public as a universal test is established." [36]

One would expect Mr. Justice Holmes to allow no finicky or textual arguments to interpose the Constitution as a barrier to the States' taxing power. In his opinions on taxation matters there is an amiable appreciation of the tantalizing difficulty of statesmen to make taxation in any form palatable.

"In the first place it is said to be an arbitrary discrimination. This objection to a tax must be approached with the greatest caution. The general expression of the Amendment must not be allowed to upset familiar and long established methods and processes by a formal elaboration of rules which its words do not import.

". . . The inequality of the tax, so far as actual values are concerned, is manifest. But, here again equality in this sense has to yield to practical considerations and usage. There must be a fixed and indisputable mode of ascertaining a stamp tax. In another sense, moreover, there is equality. When the taxes on two sales are equal the same number of shares is sold in each case; that is to say, the same privilege is used to the same extent. Valuation is not the only thing to be considered. As was pointed out by the Court of Appeals, the familiar stamp tax of two cents on checks, irrespective of amount, the poll tax of a fixed sum, irrespective of income or earning capacity, and many others, illustrate the necessity and practice of sometimes subsittuting count for weight." [37]

"There is a look of logic when it is said that special assessments are founded on special benefits and that a law which makes it possible to assess beyond the amount of the special benefit attempts to rise above its source. But that mode of argument assumes an exactness in the premises which does not exist. The foundation of this familiar form of taxation is a question of theory. The amount of benefit which an improvement will confer upon particular land, indeed whether it is a benefit at all, is a matter of forecast and estimate. In its general aspects at least it is peculiarly a thing to be decided by those who make the law. The result of the supposed constitutional principle is simply to shift the burden to a somewhat large taxing district, the municipality, and to disguise rather than to answer the theoretic doubt. It is dangerous to tie down legislatures too closely by judicial constructions not necessarily arising from the words of the Constitution. Particularly, as was intimated in *Spencer* v. *Merchant*, 125 U. S. 345, it is more important for this court to

[36] Mt. Vernon Cotton Co. *v.* Alabama Power Co., 240 U. S. 30, 32.

[37] Hatch *v.* Reardon, 204 U. S. 152, 158, 159–60.

avoid extracting from the very general language of the Fourteenth Amendment a system of delusive exactness in order to destroy methods of taxation which were well known when that Amendment was adopted and which it is safe to say that no one then supposed would be disturbed." [38]

Throughout, these opinions recognize the pressure of diverse interests of the State, the problems that confront the effort to compose those interests, and the fruitful recognition that the Constitution was not meant to thwart such obligations of statesmanship. It is just this perception of statesmanship that is dominant. So, when the very foundation of the life of a State is challenged, when the trusteeship of the State in its natural resources is involved, we get at once an eloquent and profound support of such trusteeship.

". . . it appears to us that few public interests are more obvious, indisputable, and independent of particular theory than the interest of the public of a state to maintain the rivers that are wholly within it substantially undiminished, except by such drafts upon them as the guardian of the public welfare may permit for the purpose of turning them to a more perfect use. This public interest is omnipresent wherever there is a state, and grows more pressing as population grows. It is fundamental, and we are of opinion that the private property of riparian proprietors cannot be supposed to have deeper roots. Whether it be said that such an interest justifies the cutting down by statute without compensation, in the exercise of police power, of what otherwise would be private rights of property, or that apart from statute those rights do not go to the height of what the defendant seeks to do, the result is the same. But we agree with the New Jersey courts, and think it quite beyond any rational view of riparian rights that an agreement, of no matter what private owners, could sanction the diversion of an important stream outside the boundaries of the state in which it flows. The private right to appropriate is subject not only to the rights of lower owners but to the initial limitation that it may not substantially diminish one of the great foundations of public welfare and health.

"We are of opinion, further, that the constitutional power of the state

[38] Louisville *v.* Barber Asphalt Co., 197 U. S. 430, 433–4.

"Accidental inequality is one thing, intentional and systematic discrimination another." First National Bank *v.* Albright, 208 U. S. 548, 552.

This leads him also to scrutinize shrewdly a contract of exemption from taxation:

"The construction of the statute by the Court of Appeals although not conclusive upon its meaning as a contract is entitled to great deference and respect. As a literal interpretation it is undeniably correct, and we should not feel warranted in overruling it because of a certain perfume of general exemption," Interborough Transit Co. *v.* Sohmer, 237 U. S. 276, 284.

to insist that its natural advantages shall remain unimpaired by its citizens is not dependent upon any nice estimate of the extent of present use or speculation as to future needs. The legal conception of the necessary is apt to be confined to somewhat rudimentary wants, and there are benefits from a great river that might escape a lawyer's view. But the state is not to submit even to an aesthetic analysis. Any analysis may be inadequate. It finds itself in possession of what all admit to be a great public good, and what it has it may keep and give no one a reason for its will." [39]

Only the shallow would attempt to put Mr. Justice Holmes in the shallow pigeonholes of classification. He has been imaginatively regardful of the sensibilities of the States, particularly in State controversies, and he has shown every deference, even as a matter of "equitable fitness or propriety," [40] to agencies of the States. In thus manifesting every rightful regard for self-reliant individual States, he to that extent only the more sought to maintain, so far as the judiciary plays a part, the full vigor of our dual system. From his opinions there emerges a conception of a Nation adequate to its great national duties and consisting of confederate States, in their turn possessed of dignity and power available for the diverse uses of civilized people.

In their impact and sweep and fertile freshness, the opinions have been a superbly harmonious vehicle for the views which they embody. It all seems so easy, — brilliant birds pulled from the magician's sleeve. It is the delusive ease of great effort and great art. He has told us that in deciding cases "one has to try to strike the jugular," and his aim is sure. He has attained it, as only superlative work, no matter how great the genius, can be attained. "The eternal effort of art, even the art of writing legal decisions, is to omit all but the essentials. 'The point of contact' is the formula, the place where the boy got his finger pinched; the rest of the machinery doesn't matter." So we see nothing of the detailed draughtsmanship. We get, like Corot's pictures, "magisterial summaries."

We get more: we get the man. Law ever has been for him one of the forces of life, a part of it and contributing to it. Back of his approach to an obscure statute from Oklahoma or Maine we catch

[39] Hudson County Water Co. *v.* McCarter, 209 U. S. 349, 356–7.

[40] Prentiss *v.* Atlantic Boat Line Co., 211 U. S. 210, 228.

a glimpse of his approach to life. That glimpse each must get and treasure for his own. For me, another artist unawares has expressed the clue:

"Why is there a limited authority in institutions? Why are compromise and partial coöperation practicable in society? Why is there sometimes a right to revolution? Why is there sometimes a duty to loyalty? Because the whole transcendental philosophy, if made ultimate, is false, and nothing but a selfish perspective hypostasized; because the will is absolute neither in the individual nor in humanity; because nature is not a product of the mind, but on the contrary there is an external world, ages prior to any *a priori* idea of it, which the mind recognizes and feeds upon; because there is a steady human nature within us, which our moods and passions may wrong, but cannot annul; because there is no absolute imperative, but only the operation of instincts and interests more or less subject to discipline and mutual adjustment; and finally because life is a compromise, an incipient loose harmony between the passions of the soul and the forces of nature, forces which likewise generate and protect the souls of other creatures, endowing them with powers of expression and self-assertion comparable to our own and with aims not less sweet and worthy in their own eyes; so that the quick and honest mind can not but practise courtesy in the universe, exercising its will without vehemence or forced assurance, judging with serenity, and in everything discarding the word absolute as the most false and the most odious of words." [41]

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[41] George Santayana, "German Philosophy and Politics," 12 J'L OF PHIL., PSYCHOL., ETC., 645, 649.

Note: Following is a list of constitutional decisions containing opinions by Mr. Justice Holmes, arranged according to topic:

## FOURTEENTH AMENDMENT

### *Police Power: Social legislation, utility regulation, foreign corporations, procedural legislation,* etc.

Otis *v.* Parker, 187 U. S. 606; Brownfield *v.* South Carolina, 189 U. S. 426; Anglo American Co. *v.* Davis Co., No. 1, 191 U. S. 373; Same *v.* Same, No. 2, 191 U. S. 376; Rogers *v.* Alabama, 192 U. S. 226; Central Stockyards *v.* Louisville Ry., 192 U. S. 568; Rippey *v.* Texas, 193 U. S. 504; Missouri, Kansas & Texas Ry. *v.* May, 194 U. S. 267; Aikens *v.* Wisconsin, 195 U. S. 194; Lochner *v.* United States, 198 U. S. 45, 74 (dissent); C. B. & Q. Ry. *v.* Drainage Commissioners, 200 U. S. 561, 595 (dissent); Otis Co. *v.* Ludlow Co., 201 U. S. 140; Soper *v.* Lawrence Brothers Co., 201 U. S. 359; Rawlins *v.* Georgia, 201 U. S. 638; Cox *v.* Texas, 202 U. S. 446; National Council *v.* State Council, 203 U. S. 151; Patterson *v.* Colorado, 205 U. S. 454; Interstate Ry. Co. *v.* Massachusetts, 207 U. S. 79; Hudson County Water Co. *v.* McCarter, 209 U. S. 349; Moyer *v.* Peabody, 212 U. S. 78; Louisville Railroad Co. *v.* Central Stockyards Co., 212 U. S. 132; Scott County Co. *v.* Hines, 215 U. S. 336; King *v.* West Virginia, 216 U. S. 92; Laurel Hill Cemetery *v.* San Francisco, 216 U. S. 358; Northern Pacific Ry. *v.* North Dakota, 216 U. S. 579; Standard Oil *v.* Tennessee, 217 U. S. 413; Noble State Bank *v.* Haskell, 219 U. S. 104; Assaria State Bank *v.* Dolley, 219 U. S. 121; Engel *v.* O'Malley, 219 U. S. 128; Sperry & Hutchinson Co. *v.* Rhodes, 220 U. S. 502; Blinn *v.* Nelson, 222 U. S. 1; Quong Wing *v.* Kirkendall, 223 U. S. 59; Collins *v.* Texas, 223 U. S. 288; Cedar Rapids Co. *v.* Cedar Rapids, 223 U. S. 655; Western Union Tel. Co. *v.* Richmond, 224 U. S. 160; Louisville *v.* Cumberland Tel. & Tel. Co., 225 U. S. 430; Central Lumber Co. *v.* South Dakota, 226 U. S. 157; Abilene Bank *v.* Dolley, 228 U. S. 1; Madera Water Works *v.* Madera, 228 U. S. 454; Seattle, Renton & So. Ry. *v.* Linhoff, 231 U. S. 568; Hobbs *v.* Head & Dowst Co., 231 U. S. 692; Bacon *v.* Rutland Co., 232 U. S. 134; Patsone *v.* Pennsylvania, 232 U. S. 138; Chicago, Milwaukee Ry. Co. *v.* Polt, 232 U. S. 165; San Joaquin Co. *v.* Stanislaus County, 233 U. S. 454; Smith *v.* Texas, 233 U. S. 630 (dissent); International Harvester *v.* Kentucky, 234 U. S. 217; Keokee Coke Co. *v.* Taylor, 234 U. S. 224; Willoughby *v.* Chicago, 235 U. S. 45; Coppage *v.* Kansas, 236 U. S. 1, 26 (dissent); Grant Timber Co. *v.* Gray, 236 U. S. 133; Fox *v.* Washington, 236 U. S. 273; Frank *v.* Magnum, 237 U. S. 309, 345 (dissent).

### *Taxation*

Blackstone *v.* Miller, 188 U. S. 189; Kidd *v.* Alabama, 188 U. S. 730; San Diego Co. *v.* Jasper, 189 U. S. 439; Missouri *v.* Dockery, 191 U. S. 165; Fargo *v.* Hart, 193 U. S. 490; Wright *v.* Louisville & Nashville R. Co., 195 U. S. 219; Seattle *v.* Kelleher, 195 U. S. 351; Coulter *v.* Louisville & Nashville R. Co., 196 U. S. 599; Louisville & Nashville R. Co. *v.* Barber Asphalt Co., 197 U. S. 430; Savannah Ry. *v.* Savannah, 198 U. S. 392; Union Transit Co. *v.* Kentucky, 199 U. S. 194, 211 (dissent); Carroll *v.* Greenwich Insurance Co., 199 U. S. 401; Minnesota Iron Co. *v.* Kline, 199 U. S. 593; New York Central R. *v.* Miller, 202 U. S. 584; Hatch *v.* Reardon, 204 U. S. 152; C. B. & Q. Ry. Co. *v.* Babcock, 204 U. S. 585; Martin *v.* District of Columbia, 205 U. S. 135; Chanler *v.* Kelsey, 205 U. S. 466, 479 (dissent); Copper Queen Mining Co. *v.* Arizona Board, 206 U. S. 474; Raymond *v.* Chicago Traction Co., 207 U. S. 20, 40 (dissent); First National *v.* Albright, 208 U. S. 548; Paddell *v.* New York, 211 U. S. 446; Selliger *v.* Kentucky, 213 U. S. 200; Southern Railway Co. *v.* Greene, 216 U. S. 400; Louisville & Nashville R. Co. *v.* Gaston, 216 U. S. 418; Assessors *v.* New York Life Insurance Co., 216 U. S. 517; Hammond Packing Co. *v.* Montana, 233 U. S. 331; Wheeler *v.* New York, 233 U. S. 434; Pullman Co. *v.* Knott, 235 U. S. 23; Equitable Life Society

*v.* Pennsylvania, 238 U. S. 143; Bi Metallic Co. *v.* Board, 239 U. S. 441; Gas Realty Co. *v.* Schneider Co., 240 U. S. 55.

### *Eminent Domain*

Strickley *v.* Highland Boy Co., 200 U. S. 527; West Chicago R. Co. *v.* Chicago, 201 U. S. 506 (concurring); Boston Chamber of Commerce *v.* Boston, 217 U. S. 189; McGovern *v.* New York, 229 U. S. 363; New York *v.* Sage, 239 U. S. 57; Mt. Vernon Cotton Co. *v.* Alabama, 240 U. S. 30.

### COMMERCE CLAUSE

Diamond Glue Co. *v.* U. S. Glue Co., 187 U. S. 611; Hanley *v.* Kansas City Ry. Co., 187 U. S. 617; Pullman Co. *v.* Adams, 189 U. S. 420; Knoxville Water Co. *v.* Knoxville, 189 U. S. 434; Northern Securities Case, 193 U. S. 197, 400; Swift & Co. *v.* United States, 196 U. S. 375; Chattanooga Co. *v.* Atlanta, 203 U. S. 390; Rearick *v.* Pennsylvania, 203 U. S. 507; The Employer's Liability Case, 207 U. S. 463, 541 (dissent); Adair *v.* United States, 208 U. S. 161, 190 (dissent); Galveston Ry. Co. *v.* Texas, 210 U. S. 217; Missouri Pacific Ry. *v.* Larabee Mills, 211 U. S. 612 (concurring); Keller *v.* United States, 213 U. S. 138, 149 (dissent); Western Union *v.* Kansas, 216 U. S. 1, 52 (dissent); Pullman Co. *v.* Kansas, 216 U. S. 56, 75; Standard Oil Co. *v.* Tennessee, 217 U. S. 413; Southern Ry. *v.* King, 217 U. S. 524, 537 (dissent); Dozier *v.* Alabama, 218 U. S. 124; Engel *v.* O'Malley, 219 U. S. 128; Oklahoma *v.* Wells Fargo & Co., 223 U. S. 298; Western Union Tel. Co. *v.* Richmond, 224 U. S. 160; Southern Railway *v.* Burlington Lumber Co., 225 U. S. 99; Darnell *v.* Indiana, 226 U. S. 390; Kansas City Ry. *v.* Kaw District, 233 U. S. 75; Western Union Tel. Co. *v.* Brown, 234 U. S. 542; Pipe Line Cases, 234 U. S. 548; United States *v.* Portale, 235 U. S. 27; Davis *v.* Virginia, 236 U. S. 697; Charleston & Car R. R. *v.* Varnville Co., 237 U. S. 597.

### FIFTH AMENDMENT

United States *v.* Sing Tuck, 194 U. S. 161; Kepner *v.* United States, 195 U. S. 100, 134 (dissent); United States *v.* Ju Toy, 198 U. S. 253; Chin Yow *v.* United States, 208 U. S. 8; Matter of Moran, 203 U. S. 96; Ellis *v.* United States, 206 U. S. 246; Paraiso *v.* United States, 207 U. S. 368; Adair *v.* United States, 208 U. S. 161, 190 (dissent); Keller *v.* United States, 213 U. S. 138, 149 (dissent); Weems *v.* United States, 217 U. S. 349, 413 (dissent); Holt *v.* United States, 218 U. S. 245; Matter of Harris, Bankrupt, 221 U. S. 274; Hyde *v.* United States, 225 U. S. 347, 384 (dissent); Breese & Dickerson *v.* United States, 226 U. S. 1; Heike *v.* United States, 227 U. S. 131; Johnson *v.* United States, 228 U. S. 457; Tiaco *v.* Forbes, 228 U. S. 549; Norfolk & Western Ry. Co. *v.* Dixie Co., 228 U. S. 593; Nash *v.* United States, 229 U. S. 373; Herbert *v.* Bicknell 233 U. S. 70; Gompers *v.* United States, 233 U. S. 604; Pipe Line Cases, 234 U. S. 548; United States *v.* Portale, 235 U. S. 27; Brown *v.* Elliott, 225 U. S. 392, 402 (dissent).

### IMPAIRMENT OF OBLIGATION OF CONTRACT

Diamond Glue Co. *v.* United States Glue Co., 187 U. S. 611; Knoxville Water Co. *v.* Knoxville, 189 U. S. 434; Dawson *v.* Columbia Trust Co., 197 U. S. 178; Muhlker *v.* Harlem R. R. Co., 197 U. S. 544, 571 (dissent); Savannah Ry. *v.* Savannah, 198 U. S. 392; Tampa Co. *v.* Tampa, 199 U. S. 241; National Council *v.* State Council, 203 U. S. 151; Kuhn *v.* Fairmont Coal Co., 215 U. S. 349, 370 (dissent); Arkansas Ry. Co. *v.* Louisiana & Arkansas Ry., 218 U. S. 431; Fisher *v.* New Orleans, 218 U. S. 438; Calder *v.* Michigan, 218 U. S. 591; Cedar Rapids Gas Co. *v.* Cedar Rapids, 223 U. S. 655; Pomona *v.* Sunset Tel. Co., 224 U. S. 330; Murray *v.* Pocatello, 226 U. S. 318; Pittsburgh Steel Co. *v.* Baltimore Eq. Society, 226 U. S. 455; Madera Water Works *v.* Madera, 228 U. S. 454; Trimble *v.* City of Seattle, 231 U. S. 683; Hobbs *v.* Head & Dowst Co.,

231 U. S. 692; Alabama *v.* Schmidt, 232 U. S. 168; Interborough Transit *v.* Sohmer, 237 U. S. 276.

DEPRIVATION OF PRIVILEGES AND IMMUNITIES (OTHER THAN V AND XIV AMENDMENTS)

Madisonville Traction Co. *v.* St. Bernard Co., 196 U. S. 239, 257 (dissent); Chambers *v.* Baltimore & Ohio Railroad, 207 U. S. 142, 151 (concurring); Flaherty *v.* Hanson, 215 U. S. 515, 527 (dissent); United States *v.* Moseley, 238 U. S. 383.

ADMIRALTY

The Blackheath, 195 U. S. 361; The Hamilton, 207 U. S. 398.

PATENT AND COPYRIGHT

Bleistein *v.* Donaldson Lithographing Co., 188 U. S. 239; Kalem Co. *v.* Harper Bros., 222 U. S. 55.

SEPARATION OF POWERS

James *v.* Appel, 192 U. S. 129; Prentiss *v.* Atlantic Coast Line, 211 U. S. 210.

SUITS BETWEEN OR BY STATES

Missouri *v.* Illinois, 200 U. S. 496; Georgia *v.* Tennessee Copper Co., 206 U. S. 230; Missouri *v.* Kansas, 213 U. S. 78; Virginia *v.* West Virginia, 220 U. S. 1; Virginia *v.* West Virginia, 222 U. S. 17.

FULL FAITH AND CREDIT CLAUSE

German Savings Bank *v.* Dormitzer, 192 U. S. 125; Jaster *v.* Currie, 198 U. S. 144; Louisville & Nashville Ry. Co. *v.* Deer, 200 U. S. 176; Haddock *v.* Haddock, 201 U. S. 562, 628 (dissent); Northern Assurance Co. *v.* Grand View Ass'n, 203 U. S. 106; Fauntleroy *v.* Lum, 10 U. S. 230; Bagley *v.* General Fire Extinguisher Co., 212 U. S. 477; Fall *v.* Eastin, 215 U. S. 1, 14 (concurring); Michigan Trust Co. *v.* Ferry, 228 U. S. 347; Burbank *v.* Ernst, 232 U. S. 162; Hodd *v.* McGehee, 237 U. S. 611.

MISCELLANEOUS CASES

Battle *v.* United States, 209 U. S. 36 (prohibition of bribery); Selliger *v.* Kentucky, 213 U. S. 200 (export clause, art. 1, sec. 10); Flaherty *v.* Hanson, 215 U. S. 515, 527 (dissent — impairment of federal taxing power); Strassheim *v.* Daily, 221 U. S. 280 (state rendition); Glucksman *v.* Henkel, 221 U. S. 508 (extradition); Abilene National Bank *v.* Dolley, 228 U. S. 1 (state restrictions against national banks); Kener *v.* La Grange Mills, 231 U. S. 215 (bankruptcy); Bailey *v.* Alabama, 219 U. S. 219, 245 (dissent — Thirteenth Amendment).